

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 09-0048

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NICOLE GUILL,

Defendant and Appellant.

APPELLANT'S BRIEF

On Appeal From the Montana Twentieth Judicial District Court,
Lake County, Honorable Deborah Kim Christopher, presiding

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STATEMENT OF THE ISSUES

The district court's sentencing condition that Nicole continue to be responsible for all counseling, treatment or therapy costs incurred by the victim, Sarah Guill (Sarah), is illegal.

The provision in the district court's sentence restricting contact between Nicole and Douglas is unconstitutional and unreasonable.

STATEMENT OF THE CASE

Nicole Guill (Nicole) appeals from her conviction and sentence imposed by the district court. Nicole was convicted of three felony counts: Counts I and II, sexual intercourse without consent; and Count III, Incest by Accountability. (Trial Trans., pg. 33). Nicole's husband, Douglas Guill (Douglas) has also been convicted¹. Because Douglas and Nicole were tried separately, their appeals were filed separately. This Court recently affirmed Douglas's conviction and the evidentiary challenges brought on appeal. (*See: State v. D. Guill*, 2010 MT 69, 355 Mont. 490, ___ P.3d ___).

Nicole now appeals a number of sentencing issues and pre-trial rulings. Based on the arguments set forth below, Nicole asks this Court to reverse and

¹Douglas was convicted of five counts. *State v. D. Guill*, 2010 MT 69, ¶ 1, 355 Mont. 490, ___ P.3d ___.

STATEMENT OF THE FACTS

Nicole's case is more complicated than Douglas's, due in large part, to the fact that the cases against Douglas and Nicole were joined for a large portion of the proceedings. The two cases were severed by the district court when Nicole, through counsel, requested a continuance. The district court granted the continuance for Nicole but maintained Douglas's trial date because he was incarcerated. (2/13/08 Hrg. Trans., pgs. 12-15) (Dkt. No. 118).

When Nicole's case proceeded to trial on May 19, 2008, she stood accused of three felony counts. The Amended Information charged Nicole with one count of sexual intercourse without consent occurring on or about June 24, 2002 to September 11, 2006 (Count I); one count of sexual intercourse without consent by accountability occurring on or about June 24, 1992 to June 24, 2000 (Count II), and one count of Incest by Accountability occurring on or about June 24, 1992 to September 11, 2006. (Dkt. No. 150) (Trial Trans., pg. 33). Nicole maintained her innocence throughout the proceedings and continues to do so. Douglas was convicted and sentenced by the district court to a term of 50 years in the Crossroads Correctional Center with no parole. (Appendix III.)

Initially, both Nicole and Douglas were represented by the same attorney. However, the district court began to express concerns regarding this situation and

appointed the Office of the State Public Defender (OPD) to represent Nicole. (Dkt. No. 51).

In pre-trial proceedings, the State indicated it intended to use a large number of prior bad acts and transactional evidence at trial. (Dkt. No. 93). In late January and early February of 2008, counsel for Douglas filed a flurry of pretrial motions. Nicole's counsel filed a document titled "Notice of Joinder and Adoption of Defendant Douglas Guill's Pre-Trial Motions." (Dkt. No. 102). In this document, Nicole gave notice to the Court that she was adopting all pre-trial motions filed by Douglas on February 7, 2008. "Defendant Nicole Guill adopts said motions as if set forth in full herein, including briefs and Memorandum of Authorities filed in support thereof." (Dkt. No. 102).

The evidentiary issues arising out of Nicole's case – both pre-trial and during trial – resulted in a hodgepodge of rulings by the district court. The record in Nicole's case is complicated by the strange pre-trial procedural course the case took. Until February 13, 2008, the cases against Douglas and Nicole were joined. Prior to a February 13 evidentiary hearing (evidentiary hearing), the lion's share of the evidentiary motions were filed by Douglas. On February 8, 2008, Nicole's counsel filed a "Notice of Joinder and Adoption of Defendant Douglas Guill's Pre-Trial Motions." (Dkt. No. 102). During the evidentiary hearing, the district court

determined a scheduling conflict between Douglas and Nicole, plus its continued concern over what it perceived as Douglas's continued control over Nicole, would necessitate the disjoinder of the two cases. (Dkt. No. 118 & Feb. 13, 2008, Hrg. Trans., pgs. 11-14).

From that point, Nicole's case proceeded separately from Douglas's. However, on May 5, 2008, the district court issued an "Order Adopting All Rulings in DC-06-54 (Douglas's case) Not Modified Specifically For the Case At Bar." (Dkt. No. 147). In that particular order, the district court "adopt[ed] as rulings in [Nicole's] cause all rulings on motions filed in both cases that were previously entered in *State of Montana v. Douglas J. Guill* DC-06-54 but that have not been specifically modified for this case." (Dkt. No. 147). On May 7, 2008, the State filed an Amended Information. (Dkt. No. 150). In the Omnibus Hearing form on the charges set forth in the Amended Information, the State indicated it would not rely on prior acts or convictions of a similar nature for proof of knowledge or intent. (Dkt. No. 151). On-the-other hand, when Douglas and Nicole's cases were joined, the State had previously filed A Notice to Court of Intent to Introduce "Transaction Rule" Evidence and a Response to Defendant's Objection to State's Notice of Intent to Introduce Evidence of Other Acts. (Dkt. No. 93). This document was filed on February 5, 2008.

In May, 2008, after the cases had been disjoined, Nicole filed Defendant's Motions In Limine. (Dkt. No. 142). Motion number 6, requested the district court for an "order directing the State of Montana, and its prosecutors, to not make any mention, comment, offer evidence or testimony in voir dire, opening statement, closing argument or in the examination or cross examination of any witness, relating to....[a]ny offense, wrongs or acts of the Defendant for which she is not charged in this case." (Dkt. No. 142). In its Order Granting and Denying Defendant Nicole Guill's Motion(s) in Limine, the district court ruled that Nicole's Motion in Limine number 6 "is resolved in the Court's orders deciding in the companion case and as law of this case the *State's Notice of Intent to Introduce Evidence of Other Acts and State's Notice to Court of Intent to Introduce 'Transaction Rule' Evidence.*" (Dkt. No. 154).

The State's Notice of Intent to Introduce Evidence of other Acts was filed on June 19, 2007, against both Nicole and Douglas. In that Notice, the State gave notice of its intent to introduce evidence of "all incidents of violence and religious control committed by the Defendant Nicole Guill against Sarah, Jacob, and Candace Guill during the time they lived in the same household." The State claimed the evidence was offered to "demonstrate the lack of consent as well as

plan, common scheme, or design to subject both Sarah and Jacob Guill² to repeated incidents of sexual abuse.” (Dkt. No. 45).

The district court did issue a specific Order on the State’s Notice of Intent to Introduce Evidence of Other Acts and Transaction Rule Evidence on Nicole’s case. It did on Douglas’s case. “Subject to the rules of evidence applicable, the Court finds that the evidence of the [Douglas’s] control of his family, his religious beliefs as imposed on or required of his family members and any acts of physical or verbal abuses are “inextricably linked” to the allegations charged against [Douglas].”

The issue of transaction evidence and prior bad acts arose again at the February 13, 2008, hearing. At that point, the debate on those issues occurred the two cases had been separated. Douglas’s counsel handled the majority of the evidentiary hearing. However, since Nicole had adopted all of Douglas’s motions, the court determined that all arguments and rulings are available to Nicole. (Feb. 13, 2008, Hrg. Trans., pg. 36).

Douglas’s counsel did not admit the truth of any of the prior bad acts or transaction evidence, but acknowledged allegations of violence or sexual abuse by Douglas against Sarah Guill would be admissible. Douglas’s counsel also argued

² Jacob Guill was later dropped as a victim in the case against Nicole.

that even as to those acts of which Sarah was aware, the prejudicial effect would overcome any possible relevance. Douglas objected to admission of evidence of any alleged act of violence by Douglas against anyone other than Sarah. The State agreed it would not offer any such evidence of an act against a third party of which Sarah was not aware, and the court granted Douglas's (and thereby Nicole's) motion in limine to that extent. (Feb. 13, 2010, Hrg. Trans., pgs. 50-60). The district court indicated it would admit evidence of violence by Douglas against family members that Sarah was aware of and exclude evidence of violence that Sarah was not aware of. *See State v. D. Guill*, 2010 MT 69, ¶ 8, 355 Mont. 490, ___ P.3d ___. Such was the status of transaction and 404(b) evidence when Nicole's case began.

Nicole was convicted by a jury after five days of trial. (Trial Trans., pgs. 1023-1024).

Nicole was sentenced by the district court on September 16, 2008. The State presented testimony from four witnesses, each of whom gave testimony regarding their perception that Nicole was being controlled by Douglas. Two of those witnesses, Nicole's mother and sister, relayed anecdotal tales of alleged control of Nicole by Douglas. (See: Sent. Trans., pgs. 30-54, 94-97) The testimony of both was strenuously objected to by Nicole. (Sent. Trans., pgs. 31,

32, 41, 94).

The State's other witness was Dr. Robert Page. (See generally, Sent. Trans., pgs. 56-93). Dr. Page also testified during Nicole's trial. (Trial Trans., pgs. 946-978). At sentencing, Dr. Page gave testimony regarding the problems which arise from the facts of Nicole's case, her personal history and characteristics, and the lack of treatment options available for someone like her in Montana. He also gave testimony regarding Nicole's relationship with Douglas. "The traits, however, that were underneath any significant clinical picture involved a tendency towards being quite impressionable and needing validation outside herself, particularly relevant to the relationship with her husband." (Sent. Trans., pgs. 60-61).³

The State's other witness was Sandra Van Skyock, the State's probation and parole officer who developed the Pre-Sentence Investigation. Ms. Van Skyock's testimony was brief. She informed the Court that her recommendation for Nicole's sentence was "30 years with 15 suspended and participation in the MSOTA treatment program with successful completion of Phase I, Phase II. And then there was the caveat that if she refused to participate or was unable to pass the program that no time would be suspended." (Sent. Trans., pg. 99). After Ms. Van Skyock, counsel for the State promptly informed the district court that Ms.

³Dr. Pages's testimony will be further developed *infra* as necessary.

Van Skyock's recommendation would not be the recommendation of the State. (Sent. Trans., pg. 100). True to its word, the State went on to argue that the district court impose a sentence of 24 years with 20 of those years suspended for each count to run concurrently. (Sent. Trans., pgs. 102-103). The State further requested that Nicole be ineligible for parole for the unsuspended portion of that sentence. The final significant recommendation made by the State was that the court order that "there be no contact between Douglas Guill and Nicole Guill." (Sent. Trans., pg. 104). Nicole strenuously objected to the restriction that Nicole and Douglas not to have any contact. (Sent. Trans., pgs. 112-113). Despite the objection, the district court still imposed the no contact restriction and sentenced Nicole to a term in the Montana State Women's Prison for a term of 25 years with 10 suspended on each count; all three of the sentences run concurrently. (Sent. Trans., pgs. 127).

SUMMARY OF THE ARGUMENT

The district court imposed two illegal and unreasonable restrictions on Nicole sentence: (1) that she be responsible for future undermined medical costs for the victim, Sarah Guill; (2) that she be prohibited from any type of contact with her husband, Douglas Guill.

STANDARDS OF REVIEW

With regard to sentences and sentencing conditions, this Court reviews a sentencing condition for legality. “Then, because sentencing statutes authorize sentencing judges to impose conditions on deferred or suspended sentences that constitute ‘reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society,’ the ‘reasonableness’ of such conditions will be reviewed for an abuse of discretion.” *State v. Ashby*, 2008 MT 83, ¶ 9, 342 Mont. 187, 179 P.3d 1164.

ARGUMENTS

I. *The District Court Exceeded Its Statutory Authority When It Required That Nicole Shall Be Responsible For All Counseling, Treatment or Therapy Costs Incurred By Sarah.*

In its Amended Judgment of Nicole, the district court imposed restitution in the amount of \$7,249.43 plus 10%. (Dkt. No. 231, Condition 15). It also ordered Nicole to continue to be responsible for all counseling, treatment or therapy costs incurred by the victim. (Dkt. No. 231, Condition 16). Nicole concedes she is responsible for restitution pursuant to Mont. Code Ann. § 46-18-244. She would further concede the law defines “pecuniary loss” to include future medical expenses that the victim can reasonable be expected to incur as a result of the

offender's conduct, including the costs of psychological counseling, therapy, and treatment....” Mont. Code Ann. § 46-18-243(c).

However, in this specific case, condition 16 of the district court's judgment is illegal because it does not specify the total amount of restitution Nicole shall pay with regard to the future medical and treatment expenses. “Section 46-18-244, MCA, requires the sentencing court to ‘specify the total amount of restitution that the offender shall pay.’ This means the amount of restitution must be stated as a specific amount of money.” *State v. Heafner*, 2010 MT 87, ¶ 7, ___ Mont. ___, ___ P.3d ___. In *Heafner*, the district court's sentence required the defendant pay the victim's medical bills of \$255,148.84. The sentence also held the defendant liable for the victim's future medical expenses as they occur. *Id.*, ¶ 4. The defendant argued that holding him liable for unspecified medical costs violated the terms of Mont. Code Ann. § 46-18-244. The State conceded the point, and this Court agreed. This Court determined the proper course of action was to remand the case back to district court to strike the condition or, “after such further proceedings as it deems appropriate and consideration of the relevant facts and circumstances, order restitution for the victim's future medical expenses in a specified amount.” *Id.*, ¶ 13.

In Nicole's case, Condition 16 of the district court's Amended Judgment

suffers from the same defect as was present in *Heafner*. Because the district court did not specify a specific amount of money to quantify Sarah's future counseling, treatment or therapy costs, that condition is in violation of Mont. Code Ann. § 46-18-244.

Therefore, Nicole respectfully requests this Court remand this case back for resentencing in order for the district court to either strike the condition or hold a hearing to determine a specific amount to applied to Condition 16.

II. *The District Court's Sentence That Nicole Have No Contact With Her Husband Douglas Is Unconstitutional, Unreasonable, and Illegal.*

One of the primary concerns for the district court throughout the entire proceeding with the court's perception that Nicole was being controlled by Douglas. (Sept. 16, 2008, Trans., pgs. 126-131). Based on this concern, the court ordered a no contact restriction.

The Defendant shall have NO contact with Douglas Guill through any means including third parties including her brother due to Douglas Guill's demonstrated ability to control and direct her activities, thoughts and conduct as shown through the Defendant's own testimony, the testimony of her brother, Rick Christensen, and their deification of Douglas Guill. The only exception to this no contact order is if, and only if, the Defendant's therapist determines that limited contact for therapeutic purposes, under the direct supervision of the therapist, is in both community and the Defendant's best interest for her treatment and rehabilitation.

(Dkt. No. 231, pg. 3) (emphasis in original).

The district court was not alone in its support of the no contact restriction on Nicole's sentence. The State supported it, it was a recommendation in the pre-sentence investigation, as did Robert Page – the individual who conducted Nicole's psycho-sexual evaluation. (See Sept. 16, 2008, Hrg. Trans. generally & Dkt. No. 231, Exhibit A). Nicole objected to the imposition of the no contact order. (Sept. 16, 2008, Hrg. Trans., pgs. 110-114). Nicole's objection was grounded in the sanctity of marriage and the right to privacy. (Id. at pgs. 112-113). The State and the district court based the no contact order on the notion that it would both aid in Nicole's rehabilitation and the protection pursuant to Mont. Code Ann. § 46-18-201. The no contact restriction, however, is notably absent from Douglas's judgment. (See Appendix III).

“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1187, 1184, 18 L. Ed. 2d 1010 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). The right to marry and to marital privacy are rights protected by the Due Process Clause. This clause protects the individual against certain governmental actions regardless of the fairness of the procedures used to implement them. It also provides heightened protection against government interference with certain

fundamental rights and liberty interests. *See Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997). In addition to the Due Process Clause, the United States Supreme Court has recognized that marriage is protected by the right to privacy and the U.S. Constitution's protections of free association. "We deal with a right of privacy older than the *Bill of Rights* – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S. Ct. 1678, 1682, 14 L. Ed. 2d 510 (1965).

This Court has long considered Montana's enumerated right to privacy in Article II, Section 10 of the Montana Constitution to provide a heightened right to privacy which is broader than that provided by the United States Constitution. *See: State v. Siegal*, 281 Mont. 250, 934 P.2d 176 (1997); *State v. Scheetz*, 286 Mont. 41, 950 P.2d 722 (1997); *State v. Hardaway*, 2001 MT 252, P32, 307 Mont. 139, 36 P.3d 900; *State v. Hill*, 2004 MT 184, 322 Mont. 165, 94 P.3d 752; *State v. Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771; *State v. Bassett*, 1999 MT

109, 294 Mont. 327, 982 P.2d 410 (citing *State v. Hubbel*, 286 Mont. 200, 208, 951 P.2d 971, 975-976 (1997)). Therefore, by logical extension, Montana's right to marital privacy and marital association is broader than even that which has already been established by the United States Supreme Court under the United States Constitution.

Given the rights implicated in the district court's no contact provision, the restriction must be justified by a compelling state interest. Assuming *arguendo* a compelling state interest is found in the no contact order, the order must be sufficiently and closely tailored to effectuate only that compelling interest. *State v. Siegle*, 281 Mont. 250, 278, 934 P.2d 176 (1997).

At the sentencing hearing, the State conceded the no contact restriction infringed on Nicole's constitutional rights, but argued a compelling state interest. "I think [Mont. Code Ann. § 46-18-801⁴] clearly states that a sentencing judge can infringe on a defendant's constitutional rights so long as it is directed toward rehabilitation and protection of society which I think [the no contact restriction] does in this case." (Sept. 16, 2008, Hrg. Trans., 108). In imposing the no contact

⁴"Conviction of an offense does not deprive the offender of a civil or constitutional right, except as provided in the Montana constitution or as specifically enumerated by the sentencing judge as a necessary condition of the sentence directed toward the objectives of rehabilitation and the protection of society...." Mont. Code Ann. § 46-18-801(1).

restriction, the district court paid scant attention to the statutory provisions of protection of society. The district court's focus was, ostensibly, for the rehabilitation of Nicole. However, rather than focused on rehabilitation, the district court's justification for the sentenced appeared motivated by a judicial sense of paternalism or a need to liberate Nicole from Douglas for her own good.

[P]robably the most difficult condition that the Court is imposing in this case is no contact with Mr. Guill. I recognize that of all the things, and especially in view of the statement by the defendant that that is probably tantamount to a death sentence for her, it is the only way, based on what the Court has from outside her testimony, that the Court has any way to provide for some kind of hope that she will be able to develop a life that she can live in that's not required of her to be an absolute servant.

(Sept. 16, 2008, Hrg. Trans., pgs. 128-129).

Nicole does not deny that rehabilitation and the protection of society are compelling state interests. However, for Nicole, the no contact restriction imposed by the district court serves neither of those purposes and, even if it did, the no contact provision is far too broad to withstand constitutional scrutiny.

The purpose of rehabilitation is not to conform all of a person's behavior to some preexisting societal norm. With regard to this issue, this Court has ruled the goal of Montana's sentencing laws "are: (1) to *rehabilitate* the offender by imposing restitution or requiring treatment so that he or she does not repeat the

same criminal conduct that gave rise to the sentence; and (2) to *protect* society from further similar conduct.” *State v. Ommundson*, 1999 MT 16, ¶ 11, 293 Mont. 133, 974 P.2d 620. (Emphasis in the original. Overruled on other grounds).

The best argument that the no contact restriction will serve no rehabilitative purposes is logistics. The simple reality is that Douglas Guill will die in prison. At the time of his sentencing he was approximately 54 years of age. He received a 50-year sentence to the Montana State Prison with no parole. (Appendix III). Barring unlikely intervention by an executive power, he will be confined for the remainder of his years.

Dr. Page’s testimony during the sentencing hearing is also instructive of, at least, the over breadth of the no contact restriction. When asked if Douglas’s influence on Nicole inhibited her ability to operate on a daily basis, Dr. Page replied, “[n]ot on a general day-to-day basis, she was able to function fairly well. The sole relation between what would be considered pathological became the allegations against her as allegedly influenced by [Douglas].” (Sept. 16, 2008, Hrg. Trans. pg. 61). Counsel for the State also asked Dr. Page to opine on whether Nicole had the ability to act independently of Douglas. Dr. Page responded, “evidence supports that other than the current situation which involves her relationship with Mr. Guill, she has demonstrated autonomy and an ability to

maintain herself as an individual.” (Sept. 16, 2008, Hrg. Trans. pg. 67). Shortly after making that statement, the following colloquy took place between State’s Counsel and Dr. Page.

Q. What role does Mr. Guill play in Nicole’s life, if you have an opinion on that, as far as being able to influence her?

A. I don’t know Mr. Guill and I feel uncomfortable specifically talking about areas that I don’t know about personally firsthand. In other words, I’ve never evaluated him, I’ve never met him. My only sources of evidence support that whoever the man is or was or will be was a major player in contributing to the external gains and gratification and rewards that caused Ms. Guill to act in the way that she did.

Q. So the gains and the things that – the reason why Nicole committed these crimes would have been – would have been based on Mr. Guill’s influence on Nicole?

A. Evidence suggests – I don’t know for sure, but evidence suggests that that was major factor. I mean, in influencing an otherwise healthy person to act in ways that I believe they otherwise would not have acted, it’s not responsible to assume that there’s no area – there’s no attachment there, there’s no relationship there. ...

(Sept. 16, 2008, Hrg. Trans. pg. 69). Ultimately Dr. Page agreed the no contact restriction would protect society and “enhance the possibility of rehabilitation.”

(Sept. 16, 2008, Hrg. Trans. pgs. 71-72).

Under examination from Nicole’s attorney, Dr. Page acknowledged Nicole exhibited no signs of paraphelia, i.e. a deviant sexual interest of some kind,

antisocial or sadistic behavior, or narcissism, and, other than being somewhat dependent, Nicole is somewhat “normal.” (Sept. 16, 2008, Hrg. Trans. pg. 79).

Absent the presence of a deviant sexual interest, antisocial or sadistic behavior, and narcissism, the question becomes what type of rehabilitation does a somewhat dependent but otherwise normal defendant require. The answer is certainly not a drastic curtailment of the fundamental right to marital communication and marital privacy.

Nicole’s situation is analogous to the situation faced by this Court in *State v. Muhammad*, 2002 MT 47, 309 Mont. 1, 43 P.3d 318. In *Muhammad*, the defendant plead guilty to the offense of sexual intercourse without consent in Cascade County. The district court imposed a suspended sentence but imposed a condition which barred Muhammad from residing or working in Cascade County. *Muhammad*, ¶ 12. Muhammad appealed the condition as unreasonable and a violation of his constitutional rights. This Court, without specifically deciding the constitutional issue, agreed the condition was not reasonably related to Muhammad’s rehabilitation or the protection of the victim and society. *Muhammad*, ¶ 29.

Although the District Court stated no reasons for the imposition of the condition, presumably the condition was imposed to protect the victim. (Judge Johnson stated at the revocation hearing, “I did not

want to subject this victim to ever seeing you in this county.”) The record establishes the District Court had facts before it at the time of sentencing would render the condition unduly severe and punitive to the point of being unrelated to rehabilitation. Specifically, Muhammad was residing in Cascade County at the time of the sentencing and had family there....In addition, Muhammad was precluded from petitioning the District Court’s statement during the revocation hearing that he was “not to be here, period, end of story, ever.” Further, in addition to imposing the banishment condition, the District Court imposed less restrictive means to rehabilitate Muhammad and to protect the victim and society, including imposition of the following requirements: that he obtain sexual offender treatment, have no contact with the victim or her family, register as a sexual offender and as a violent offender, have no contact with females under the age of 18, have no employment, service or recreational pursuits which involve the supervision of children, not frequent places where children congregate, and not live within two blocks of an area where children congregate.

Muhammad, ¶ 28.

As in *Muhammad*, the district court in Nicole’s case also imposed less restrictive conditions which would aid rehabilitation and protect Sarah and society including:

registering as a tier II sexual offender, completion of sexual offender treatment prior to parole eligibility; complete Cognitive Principles & Restructuring (CP&R) or similar cognitive and behavioral modification program and follow all treatment recommendations; enter and complete a class which addresses power and control to assist the Defendant in dealing with her violent criminal behaviors—which may include anger management if the class does address concerns of power and control as part of conviction of a sexual offense; have no contact with individuals under the age of 18 except with appropriate supervision, not be involved in any type of

employment, service or recreational pursuit that involves the supervision of children, nor, under any circumstances, be in a position of power and authority over children; submit to annual polygraph testing; and not date, live with, or otherwise be aligned with any person with children under the age of 18 without the express prior approval of the therapist and the probation office.

(Dkt. No. 231). Finally, as an added protection for Sarah, the district court restricted Nicole from visiting or residing in any city where the victim resides.

(Dkt. No. 231, pg. 3).

Therefore, in addition to its unconstitutionality, the district court's no contact restriction is unreasonable. Given the reality of the situation, i.e. that Douglas will die in prison, and that Nicole will be either in custody or on supervision for a very long time. Sarah and society are both sufficiently protected with the other remaining conditions of Nicole's sentence. As a result, this Court should remand this case to the district court with orders to strike the no contact provision.

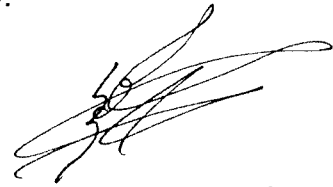
CONCLUSION

Based on the above facts and argument, Nicole respectfully requests this Court strike the illegal and unreasonable sentencing provisions and remand this case to the district court for resentencing especially with regard to the no contact restriction.

While the district court may have had concerns about the state of Douglas's

and Nicole's marriage the restriction on contact between Douglas and Nicole is a violation of their constitutional rights. The same district court did not apply a no contact restriction on Douglas, only Nicole. The restriction is over broad and is overkill especially given the litany of other, less restrictive, conditions of Nicole's sentence which satisfy the statutory purposes of rehabilitation and protection.

Respectfully submitted this 1~~8~~²th day of May, 2010.

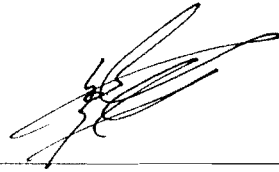


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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with a proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words as calculated by my WordPerfect X3 software.

Dated this 1²~~8~~th day of May, 2010.



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CERTIFICATE OF SERVICE

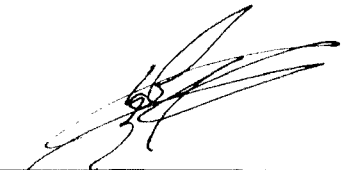
I, Colin M. Stephens, do hereby certify that I delivered a true and correct copy of this Appellant's Opening Brief to the individuals set forth below via the means indicated.

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